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206-047—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 871

LANDON V. BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (9 R. 1–21; Pet. App. 1a–20a) is reported at 351 F. 2d 14.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1965 (9 R. 22; Pet. App. 20a–21a), and a petition for rehearing (9 R. 23–36) was denied on November 4, 1965 (9 R. 37). On November 19, 1965, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including January 3, 1966, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a change of venue.

2. Whether the jury was improperly exposed to prejudicial publicity.

RULE INVOLVED

Rule 21(a) of the Federal Rules of Criminal Procedure provides:

> RULE 21. TRANSFER FROM THE DISTRICT OR DIVISION FOR TRIAL
>
> (a) *For Prejudice in the District or Division.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

STATEMENT

Following a trial by jury, petitioner was convicted in the United States District Court for the Eastern District of Missouri on counts 1 and 3 of a five-count indictment (1 R. 1–8) charging that he knowingly transported in interstate commerce $168,000 worth of stolen corn and soybeans (count 1) and a stolen check in the amount of $6,000 (count 3), in violation of 18 U.S.C. 2314. One Thompson, who was named as a

codefendant on count 1, was acquitted.[1] Petitioner was sentenced generally to ten years' imprisonment and to pay a fine of $10,000 (1 R. 116). The court of appeals affirmed (9 R. 22; Pet. App. 20a–21a).

Since petitioner does not challenge the sufficiency of the evidence to support his conviction, there is no occasion to summarize the proof in detail. As noted in the opinion below (Pet. App. 2a; see also Pet. App. 17a–18a), it was the government's theory as to count 1 that petitioner, with unlawful intent to provide himself with funds for speculation in commodities futures, caused a large quantity of grain to be removed from the elevators of the Federal Grain Company ("Federal") to those of Best Gin and Land Company ("Best") and thereafter to be shipped in interstate commerce, with drafts ultimately diverted to petitioner for his own speculative purposes. It was the government's theory as to count 3 that petitioner caused the bookkeeper of Federal to draw a check on that company's account to the order of another company, controlled by petitioner, and that he thereafter caused the check to be transported in interstate commerce from Tennessee to Missouri, the proceeds of the check being expended for petitioner's speculative pur-

[1] Count 2, which charged both petitioner and Thompson with the interstate transportation of another consignment of stolen grain, was dismissed at the trial as to both defendants on motion of the government (6 R. 1163). Petitioner was acquitted on count 4, which charged him alone with the interstate transportation of other stolen securities (1 R. 92). Both petitioner and Thompson were acquitted on count 5, which charged them with conspiracy to violate the statute involved in the substantive counts.

poses. Petitioner was the operating manager of Federal and controlled Best, a corporation owned by his family.

The facts germane to the contentions raised in the petition for a writ of certiorari may be summarized as follows:

1. On December 14, 1962—six months after the return of the indictment—petitioner and his codefendant filed a motion in the district court, pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure (*supra*, p. 2), for an order transferring the cause for trial from the Southeastern (Cape Girardeau) Division of the Eastern District of Missouri to the Eastern (St. Louis) Division of the same District, on the ground that there existed prejudice against them in the Southeastern Division so great that they could not obtain a fair and impartial trial there (1 R. 49).[2] Attached to the motion were affidavits by seven residents of the Southeastern Division (1 R. 51–63), of which the affidavit of J. R. Lee (1 R. 51–52), which we summarize, was illustrative and typical.

Lee attested that petitioner and Thompson were the operators of the Federal Grain Company, which to his knowledge had become bankrupt and was indebted

[2] The indictment, which was returned in the Eastern Division of the District, had previously been transferred to the Southeastern Division, on motion of the government, for the reason that the indictment charged "an offense committed within the Southeastern Division" (1 R. 9). The December 14 motion was thus, in effect, one to have the cause transferred back to the Eastern Division.

to many farmers in the area with respect to grain which they had purchased from them; that petitioner and Thompson had subsequently been indicted by a federal grand jury (the proceeding involved at bar), charged with an offense arising out of their conduct of the affairs of Federal; that there had been extensive publicity about the case in the local newspapers and on local radio and television stations, indicating or insinuating that there had been wrongdoing on the part of the accused; that the affiant had talked to many people in southeastern Missouri concerning the accused and Federal in the past two years and had heard it said almost unanimously by such persons that the accused had stolen and diverted funds of Federal, that they had cheated hundreds of farmers out of their crops, and that they would surely be convicted. Neither of the accused, the affidavit concluded, could, in the affiant's opinion, receive a fair trial in the Cape Girardeau Division of the court (1 R. 51–52).

The government, opposing the motion, pointed out that the venue of the charged offenses was the Southeastern Division of the District; that approximately 90 per cent of the government's witnesses (who were estimated to total 25) resided in the Southeastern Division; that while it was true that the matters in issue had received extensive publicity at the time of the commission of the alleged crimes, "in November, 1960,"[3] more than two years had since passed and

[3] The substantive offenses charged were alleged to have occurred on different dates between August and November of 1960 (1 R. 1–4). The conspiracy charged in count 5 was alleged to have extended from October 3, 1960, to January 31, 1961 (1 R. 4).

much of the publicity had been forgotten; that the matters in controversy had also received wide publicity in the St. Louis area, to which the defendants were requesting that the prosecution be transferred; and that the question whether a fair trial could be had in the Southeastern Division should appropriately await the *voir dire* examination of the prospective jurors (1 R. 66–68). On March 29, 1963, the motion for transfer was denied (1 R. 70–71).

2. On November 4, 1963, the date set for trial following an intervening continuance granted at the request of the government over the opposition of both defendants (1 R. 74–75),[4] the defendants moved (1) for a continuance, on the ground that, because of the pending receivership of Federal and the publicity attending the same, there still existed such great prejudice against them that a fair trial could not then be had (1 R. 79), and (2) for an order striking from the jury panel the names of all prospective jurors who resided in any of five designated counties of the Southeastern Division, on the ground that, because of the publicity concerning the affairs of Federal in those counties, impartial jurors could not be found in those counties (1 R. 77). The defendants also renewed at this time their motion to have the case

[4] The court's March 29 order had set the case for trial on June 24, 1963 (1 R. 70–71). The government, on June 17, moved for a continuance on the ground that an important government witness was about to give birth to a child (1 R. 74). Counsel for the defendants advised the court, in opposing this motion, that the defendants were "ready for trial on June 24, 1963" and were opposed to "any continuance of the case" (1 R. 75).

transferred for trial to the Eastern Division of the District (1 R. 76). The motion for continuance was denied on the same day, prior to the commencement of the *voir dire* examination of the prospective jurors (2 R. 3). Rulings on the other two motions were reserved until after completion of the *voir dire* examination (*ibid.*), at which time they too were denied (2 R. 236).

3. The *voir dire* examination of the prospective jurors extended over two days, November 4 and 5, 1963 (2 R. 5 *ff.*). Wide latitude was allowed defense counsel in exploring, through personally conducted oral inquiry, for possible bias and prejudice on the part of any member of the panel (*e.g.*, 2 R. 79–135). Upon the slightest indication by any panel member that he had or might have a preconceived opinion about the merits of the case, he was excused for cause (see, *e.g.*, 2 R. 127–128). Of the approximately 60 veniremen examined (including a number of talesmen used to supplement the original panel), 22 were excused for cause because they had formed an opinion or had received an impression about the case.[5] Four others were excused for cause for reasons unrelated to bias or prejudice.[6] While many of the remaining 34, not excused for cause, from whose number the jury was selected, had heard something about the case as a consequence of the publicity it had received in the past, all stated that they were wholly free of precon-

[5] 2 R. 16, 20–21, 26, 30, 31–34, 82–84, 102–104, 110–111, 116–117, 126–128, 143–144, 155, 163, 181, 183–184, 186–187.

[6] 2 R. 7, 18, 41, 43.

ceptions about it and were capable of giving the accused a fair and impartial trial.'

4. In the course of the *voir dire* examination, one of the prospective jurors stated in the presence of the other veniremen, in response to a question by the Assistant United States Attorney as to whether he felt he could give both sides a fair and impartial trial:

> I might mention we have did [*sic*] business with the pepole from Bell City and Vanduser[2] and they have caused them a lot of trouble by this mishandling by the fact that the farmers didn't get their money.

Counsel for the accused, out of the hearing of the panel, moved for a mistrial on the ground that the venireman's reference to the fact that "the farmers didn't get their money" was prejudicial (2 R. 153–154). The court denied the motion and, over the objection of counsel for petitioner, who contended that

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[1] Illustrative of the comments by the veniremen in this latter category were the following: "I do remember seeing or reading an article or hearing something about it but I wasn't interested and didn't pay any attention to it" (2 R. 119); "I glanced through the article when it came out but I had no interest and I just forgot about it" (2 R. 133); "Possibly a couple or three times I seen it in the paper but I wasn't interested enough to read the articles" (2 R. 113); "I just read the headlines as anybody reads headlines, I didn't go into detail on it" (2 R. 112); "Just the headlines. * * * I wasn't concerned" (2 R. 97); "* * * I possibly glanced through it" (2 R. 108); "* * * I didn't bother with it" (2 R. 166); "* * * I have forgotten all about it" (2 R. 98, 122, 124); "* * * it went in one ear and out the other" (2 R. 107).

[2] These were two of the towns in which Federal maintained elevators from which some of the grain involved in the indictment had allegedly been stolen (1 R. 1).

an instruction would "emphasize this matter rather than cure it" (2 R. 154), instructed the panel to "disregard the remarks of the last juror who is being examined and cast from your mind anything he may have said or that anybody else may say that is not evidence in this case to cause an impression relative to the guilt or innocence of either one of these defendants" (2 R. 155).*

5. On the afternoon of the second day of the *voir dire* examination, the court reported to the panel that it had come to the court's attention that one of the panel members who had been excused for cause, a Mrs. Lakeman, had, during a recess, made a remark in the ladies' restroom concerning one of the defendants on trial, and inquired whether any of the ladies still on the panel had heard it or knew anything about it (2 R. 191–192). When several panel members responded affirmatively, the court held a hearing in chambers to ascertain the facts (2 R. 192–205). Five lady members of the panel were called in and informally questioned by the court and counsel for both sides. They stated in substance that while in the restroom they had heard Mrs. Lakeman remark to petitioner's wife (whose identity was not known to Mrs. Lakeman) that she (Mrs. Lakeman) was surprised to see petitioner in the courtroom because she thought he was still in the penitentiary (2 R. 193–195, 196, 198, 201, 204). Each of the interrogated panel

* The panel member whose remark had occasioned the instruction was excused for cause upon his acknowledgment that he entertained some prejudice about the case (2 R. 155).

members stated, on inquiry, that the remark did not prejudice her against petitioner (2 R. 193–194, 197, 199, 202, 204).

At the conclusion of the hearing, the court asked counsel for petitioner if there was any motion he wished to make. Counsel replied in the negative (2 R. 205). While indicating that he had some concern as to what "the rest of the panel" might have heard about the incident under inquiry, and how anything they might have heard might affect their feelings toward petitioner (2 R. 206), counsel expressly stated, on inquiry, that he had no objection to any of the interrogated venirewomen remaining on the panel (2 R. 207–208).

Pursuant to a procedure which the court indicated would be followed as a result of the incident under inquiry (2 R. 207), petitioner himself was then called into the court's chambers, where, over objection by the government, he was permitted to testify, under interrogation by his counsel and in the absence of any panel member, concerning a prior State and related federal conviction (2 R. 208–212). He was permitted to explain in some detail the factual background of these prior convictions (2 R. 209–210). Government counsel's objection to these recitals was based on the asserted fact that they were "irrelevant" and "self-serving", and had "no place" in connection with the *voir dire* examination of prospective jurors (2 R. 212).

The court then announced that it would permit counsel for petitioner, in view of the restroom incident

and the subsequent developments, to "make a statement" to the panel members concerning "the circumstances of those two offenses of which Mr. Butler was convicted" and to inquire of them "whether or not those facts would prejudice them" against either accused (2 R. 212). Accordingly, counsel for petitioner, again over government objection, was permitted to tell the members of the jury panel, in counsel's language, about his client's prior convictions and the circumstances which led up to them, and to inquire of each panel member whether the convictions would prejudice the prospective juror against his client in the juror's consideration of the evidence which would be adduced in this case (2 R. 220–229).[10]

[10] Counsel's statement concerning the background of the convictions was, in part, as follows (2 R. 221–222):

> In 1954, approximately, [petitioner] was engaged in the marketing business which he has been in all of his life, buying and selling commodities on the futures market. He had what they call cornered the soybean market. He owned probably close to 96 percent of all the futures on all the soybeans. He was heavily invested in other commodities such as cottonseed oil and cotton and so on. He at that time was worth several million dollars. * * * Mr. Butler owned an export elevator on the gulf at Mobile, Alabama. During that period he sold warehouse receipts in a great quantity representing two or three million bushels of beans to one or two concerns in Chicago and New York. These warehouse receipts were paper, they were sent in the mail to these houses representing that they had sold these million bushels of beans or so and that they were in the warehouse there at Mobile. As a matter of fact, at the time these warehouse receipts were sent through the mail or sold, there were only a part of those beans in the warehouse. He had other beans bought on contract in Chicago and around the country and beans

Each panel member, in response to a specific inquiry by petitioner's counsel, stated that the matters related by counsel would not influence him in appraising the evidence introduced in the instant case or prevent him from giving petitioner a fair and impartial trial (2 R. 224–229). Counsel did not move to strike for cause any member of the panel on account of the restroom incident and the subsequent developments.

6. At the trial, after petitioner had testified on direct examination, he was asked on cross-examination whether he had ever been convicted of a felony. He replied that he had. He was then asked what that felony was. Over petitioner's objection, the court required petitioner to answer. The trial judge observed that while ordinarily the government would be permitted to establish only the fact that the witness had been convicted of a felony, in this case petitioner had, at counsel's request and prior to the empaneling of the jury, been permitted to make a statement under oath about the nature of his prior convictions, and

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also on barges on the river which were going in that direction in sufficient quantity to cover the sale that he had made but they were not in the warehouse. That was a violation of the law to sell these warehouse receipts when those beans were not in the warehouse. It was a violation to send those receipts under those circumstances through the mail.

* * * * *

* * * [Petitioner] was then charged with violating the law which he did violate which is not only an offense in respect to the State of Tennessee but is an offense as far as sending these certificates through the mail. * * * He went into court, admitted that that was what he done [sic]. He received a sentence and a fine. * * *

counsel had then been permitted to make a statement to the prospective jurors about the circumstances of those convictions and to question them with respect thereto (7 R. 1570–1571). Government counsel was then permitted to bring out through questioning that petitioner's State court conviction had been for obtaining money under false pretenses by issuing warehouse receipts for over a thousand boxcars of grain when, in fact, there were only four boxcars of grain in the warehouse (7 R. 1572–1573).

ARGUMENT

1. There is no merit to petitioner's contention that he was entitled, as of right, to a change of venue from the Southeastern to the Eastern Division of the district (Pet. 6–10). Rule 21(a) of the Federal Rules of Criminal Procedure (*supra*, p. 2) vests large discretion in the trial court as to whether a change of venue is required in the interest of justice in the circumstances of a particular case. See, *e.g.*, *Connelly* v. *United States*, 249 F. 2d 576, 584–585 (C.A. 8), certiorari denied, 356 U.S. 921; *United States* v. *Moran*, 236 F. 2d 361, 362 (C.A. 2), certiorari denied, 352 U.S. 909; *Reynolds* v. *United States*, 225 F. 2d 123, 128–129 (C.A. 5), certiorari denied, 350 U.S. 914. Cf. *Stroud* v. *United States*, 251 U.S. 15, 18–20. There was no abuse in this case. The mere existence of publicity, even if intensive, does not require a change of venue. *Estes* v. *United States*, 335 F. 2d 609, 614 (C.A. 5), certiorari denied, 379 U.S. 964; *United States* v. *Moran*, *supra*, 236 F. 2d at 362;

Reynolds v. *United States, supra,* 225 F. 2d at 128–129. Cf. *Stroud* v. *United States, supra,* 251 U.S. at 18–20. "The ultimate question is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the *voir dire* examination." *Blumenfield* v. *United States,* 284 F. 2d 46, 51 (C.A. 8), certiorari denied, 365 U.S. 812. A trial court may, accordingly, properly defer the disposition of such a motion until after the *voir dire* examination of the prospective jurors, and may deny it at that time if it ascertains from those proceedings that a fair trial in the district or division can be had. *E.g., Estes* v. *United States, supra,* 335 F. 2d at 614. This, in substance, was what the trial court did here.[11]

The *voir dire* examination held in this case did not, contrary to petitioner's contentions, disclose any sound reason for the court to grant the requested transfer at that time. Twenty-two of the approximately 60 veniremen who were summoned were excused for cause for reasons associated with prejudice,

[11] *United States* v. *Florio,* 13 F.R.D. 296 (S.D.N.Y.), relied on by petitioner (Pet. 9), gives no support to his position. In that case a change of venue was granted because of, among other things, an "avalanche of publicity", adverse to the accused, which had "reached the public on the very morning when the jury was to be impaneled" (13 F.R.D. at 297–298). Nothing like that occurred in the instant case. Because of the "unique" situation presented in the cited case (*id.* at 298), the trial court there exercised its discretion in favor of a venue change. The court, significantly, noted in its opinion that it was "emphatically not [its] view that in all cases where there is considerable publicity should the court grant a change of venue" (*id.* at 299).

under the most liberal of standards after extensive, personally conducted oral inquiry by defense counsel. But the court had no difficulty in assembling a roster of persons, free of bias, large enough to permit the empaneling of the jury of twelve and two alternates after allowing for all peremptory challenges authorized by law. It is true that many of those not excused for cause had heard something about the case as a result of its earlier publicity.[12] All the jurors, however, were able to assure the court and counsel that they were free of preconceptions in the matter and could give the accused a fair and impartial trial. That the jury in fact entertained no bias or prejudice against petitioner is strongly suggested, moreover, by the fact, noticed by the court of appeals (Pet. App. 10a), that it acquitted petitioner on two of the four counts which were submitted to it (see note 1, *supra*).

The vague remark during the *voir dire* by one of the veniremen (*supra*, pp. 8-9) did not require either the declaration of a mistrial, as the accused requested, or the granting at that time of the motion for transfer. The court promptly instructed the other members of the panel to disregard the remark and not to permit it to influence them in any way in any verdict they might be called on to return if selected as jurors. The venireman who made the remark in question was excused. This was an adequate safeguard, particularly since, as the court of appeals observed, the "es-

[12] For the details as to the extent to which the jurors who actually sat on the case had heard about the case previously, see the court of appeals' opinion at Pet. App. 9a.

sential contents of the venireman's statement were later presented in testimony before the jury" (Pet. App. 8a).

Petitioner's reliance on 28 U.S.C. 1865(a), providing that "[g]rand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service * * *" (Pet. 8–9, 10), is misplaced. He argues that the first portion of this provision "[s]eemingly * * * would have dictated instant acquiescence in at least the motion to restrict the jury panel to residents of counties where people had not dealt with [Federal]" (Pet. 8–9; see p. 6, *supra*. While the language relied on would undoubtedly have *authorized* the court, in its discretion, to restrict the membership of the panel in the manner suggested (see *Connelly* v. *United States*, 249 F. 2d 576, 583–584 (C.A. 8), certiorari denied, 356 U.S. 921; *Myers* v. *United States*, 15 F. 2d 977, 978–979 (C.A. 8)), we are aware of no decision, and petitioner cites none, which construes this provision as *requiring* the court to exclude from the venire residents of certain areas of the district merely because those residents may be more likely to be familiar with the events to be tried than the residents of other areas. If the court, in other words, is convinced that a fair and impartial jury can be empaneled without the imposition of such a geographical restriction on the makeup of the panel (which belief will of course be subject to the test of the

voir dire examination), it is not required to impose such a restriction in advance merely because it might agree that the selection of the jury would be simpler or speedier if such a limitation were imposed. The provision, in short, has never been deemed to deprive the court of the discretion with which it has always been deemed clothed in the handling of motions of this character. Cf. *Walsh & Wells* v. *City of Memphis*, 32 F. Supp. 448, 450–451 (W. D. Tenn.) (a civil case, under a substantially similar predecessor statute, involving a motion to exclude from the jury panel all residents of a particular county of the division). Furthermore, petitioner did not, in his pre-trial motion, rely on, or even call the court's attention to, the provision now invoked, which, so far as appears, he urged for the first time on appeal. He can hardly be permitted to fault the trial court for failing to grant a motion on the basis of a provision of law which he did not even call to the court's attention.

2. There is likewise no substance to petitioner's claim that his conviction should be summarily reversed because the jury was exposed, as a result of adverse publicity, to information about a prior crime of which he had been convicted (Pet. 2, 10–13). When it became apparent, at the *in camera* hearing held during the *voir dire* examination (pp. 9–10, *supra*), that five lady members of the panel had become aware that petitioner had served a term in the penitentiary, petitioner's counsel, though invited to do so by the court, refrained from making any motion and stated that he was agreeable to all five of the ladies' remaining on

the panel. In accordance with a procedure which, so far as appears, was agreeable to petitioner's counsel, counsel was permitted to make a statement to the jury panel, describing in his own language the nature of the prior offenses and the background circumstances. Counsel thereafter elected not to request the excusal of any member of the panel for cause.

We submit that the handling by the trial court of the unique situation presented by the restroom incident and the subsequent developments involved an appropriate exercise of the court's discretionary authority. Petitioner's principal contention—apart from the claim that the remark itself demonstrated hostility in the division—is that it was error for the court to permit petitioner to be cross-examined with regard to the prior convictions. That ruling was, however, well within the limits of the court's discretion. As noted by the court of appeals, "the trial judge recognized * * * that [petitioner] opened up the scope of the inquiry himself" (Pet. App. 10a). Except for the numbers of boxcars involved in the prior offense, the jurors were already aware, from defense counsel's own statement to them during the empanelment proceedings (note 10, *supra*), of the essential facts underlying the prior convictions. They knew from that statement that the offense had involved "warehouse receipts" issued by petitioner for "beans [which] were not in the warehouse" (note 10, *supra*). Defense counsel had, to be sure, sought in his statement to present the underlying facts in as soft a light, from his client's viewpoint, as he could.

But since the basic facts were already known to the jury, as a consequence of counsel's strategic decision to make them known himself even before the jury was selected, the additional details brought out by the prosecutor were in no event a basis for reversible error.[13]

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

FEBRUARY 1966.

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[13] *Marshall* v. *United States*, 360 U.S. 310, involved a factual situation far afield from anything that occurred in this case, and petitioner's reliance on it (Pet. 12–13) is for that reason misplaced. There, the jury learned through some news accounts, in the course of a trial, that the defendant had previously been convicted for practicing medicine without a license—information which the trial judge had specifically excluded because he deemed it too prejudicial to warrant its admission on a theory of relevance which had been proposed by the government. Because of the jurors' exposure, in this manner, to information which had been ruled "so prejudicial it could not be directly offered as evidence" (360 U.S. at 312), this Court reversed the resulting conviction in the exercise of its supervisory powers. In the present case, the fact of the prior convictions was concededly admissible, and the additional elaboration was permissible in light of what petitioner's own counsel had previously reported to the jury.

U.S. GOVERNMENT PRINTING OFFICE: 1966